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In the Supreme Court of the United States.

OCTOBER TERM, 1897.

P. H. KIRWAN ET AL., APPELLANTS,
v.
SIMON J. MURPHY ET AL. } No. 550.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

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STATEMENT.

In 1876, under authority from the Commissioner of the General Land Office, a contract was made by the surveyor-general of Minnesota with one Howe, a deputy surveyor, to make a survey of certain lands in township 57 north, range 17 west, in St. Louis County, Minn. Thereafter, upon certain pretended field notes of the survey returned by Howe, a plat of the land was made by the surveyor-general and filed with the Commissioner. No survey was in fact made by Howe. The exterior boundaries of the land only were run; no division into sections or smaller subdivisions was ever attempted, and no streams or bodies of water were meandered.

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There existed at the time of the so-called survey upon the lands concerned a lake, known as Cedar Island Lake or Ely Lake, which actually covered an area of less than 700 acres, but which was returned by Howe in his field notes as covering an area of about 1,900 acres. The pretended meander line of this lake was purely fictitious and was never attempted to be run by Howe. Certain fractional lots, bounded by the pretended meander line of the lake, were platted from the Howe field notes and were purchased by parties through whom the appellees claim title. Between the pretended meander line and the actual shore line of the lake there existed at the time of the pretended survey, and still exists, a tract of dry wooded land, containing about 1,200 acres. By virtue of their ownership of the fractional lots, the appellees claim to be owners of all the land intervening between the pretended meander line and shore line of the lake.

In 1893, upon the application of certain settlers on this intervening tract for a survey thereof so as to enable them to enter the lands as homesteads, the Secretary of the Interior, after many hearings, adjudged the Howe survey fraudulent. Thereafter the Secretary directed a survey of the tract, and the appellant, Kirwan, as United States surveyor-general for the district of Minnesota, entered into a contract with his coappellant, Croswell, a United States deputy surveyor, to survey and subdivide the lands.

This action was brought in the circuit court of the United States for the district of Minnesota to restrain the appellants from carrying out said contract. A hearing was had upon bill, answer, and replication, and a

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temporary injunction issued restraining the carrying out of the contract. From the decree directing the injunction to issue, an appeal was taken to the circuit court of appeals, by which court it was affirmed. From that decree appeal was taken here.

ARGUMENT.

The single question before the court presented by the motion to dismiss is whether in a case in which this court would have jurisdiction on appeal from a final decision of the circuit court of appeals it has jurisdiction of an appeal therein from a decree of that court affirming a decree or order of the circuit court granting a temporary injunction.

It is contended by counsel for the appellees that unless the act of March 3, 1891, creating the circuit courts of appeals, specifically authorizes appeals to this court in such cases, such authority does not exist, and it is insisted that while an appeal from an interlocutory order may be taken from the lower court to the circuit court of appeals under section 7 of that act, the right to a further appeal to this court is nowhere given.

The question turns upon the following language in section 6 of the act of March 3, 1891 (26 Stats., 826), establishing the circuit courts of appeals.

> That * * * the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposing parties to the suit or controversy, being aliens or citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases. * * *

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> In all cases not hereinbefore in this section made final, there shall of right be an appeal on writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed $1,000, besides costs; but no such appeal shall be taken on writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

The case was heard in the circuit court on the bill, in which the title of the complainants was asserted; the answer, in which that title was denied, and a general replication. The title of the Government to the land, upon which depended its right to make the survey, was passed upon. The injunction issued against the officers of the United States restraining them from carrying out the contract to survey the land must necessarily have been based upon the ground that the title to the land was in the complainants below and not in the United States. The injunction, therefore, while temporary in form, is permanent in effect. What more was or is there for the circuit court to *decide?* The result of the decree of that court, so far as it has any effect, was to declare the appellees the owners of the title to the lands in controversy.

From the order of the circuit court an appeal was taken to the circuit court of appeals, under section 7 of the act of March 3, 1891, as amended by the act of February 18, 1895 (28 Stats., 666), which is as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the seventh section of the act of Congress entitled "An act to establish circuit courts

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of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March third, eighteen hundred and ninety-one, be, and the same is hereby, amended to read as follows:

"That where, upon a hearing in equity in a district court or a circuit court, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken, under the provisions of this act, to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction to the circuit court of appeals: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal: *And provided further*, That the court below may in its discretion require as a condition of the appeal an additional injunction bond.

As stated by Wallace, J., in *Florida Construction Company* v. *Young* (59 F. R., 721), "whenever the injunction is the main relief granted, the whole case is necessarily presented for review."

The circuit court of appeals affirmed the order and decree of the circuit court. Its decree is as follows (Rec., p. 33):

This cause came on to be heard on the transcript of the record from the circuit court of the United

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> States for the district of Minnesota and was argued by counsel.
>
> On consideration whereof it is now here ordered, adjudged, and decreed by this court, that the order and decree of the said circuit court awarding a temporary injunction in this cause be, and the same is hereby, affirmed, without costs to either party in this court.

Opposing counsel say that the case was remanded for "farther proceedings." It does not appear anywhere in the portion of the record printed, or indeed in the complete record, that such was the order of the circuit court of appeals. The order or decree of the circuit court was simply that the case be "affirmed without costs to either party." The nature of the case was such, that there could be no "farther proceedings" in the circuit court, except to enter up the mandate of the circuit court of appeals and make the injunction permanent.

This court has held in *Smith* v. *Vulcan Iron Works* (165 U. S., 518) that on an appeal taken under section 7 of the circuit court of appeals act that court may go on and decide the entire case. This the circuit court of appeals appears to have done in the present instance. It has found that the Government has already parted with its title to the land "by issuing its patent therefor." (Rec., pp. 31, 32.) As the question at the bottom of this case is the ownership of the title to the land, and that question was before the court, its decision that the Government has no title is a final *decision* of that court. It is not mere dictum.

Was not the decree herein substantially a final decree?

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What more could the circuit court of appeals have done in the case? It heard the entire case as it was in the circuit court, and its decree did all that it was possible for it to do; that is, to affirm the judgment below. It did not simply look into the question whether a *prima facie* case had been made out which justified the circuit court in issuing the temporary injunction, but it went into the merits of the controversy so far as they appeared in the record sent up and as they were before the circuit court. It is submitted therefore that, so far as the decision of the circuit court of apppeals was concerned, it was final.

While there is no express language in the circuit court of appeals act giving the right of appeal to this court from a decision of the circuit court of appeals in a case not within the prohibited classes, neither is there language expressly denying it. On the contrary, the implication is clear that the "case" as it was before the circuit court of appeals is subject to review.

It is submitted that the language "in all cases not hereinbefore in this section made final" refers to the class of cases mentioned in the preceding paragraph of the section, *i. e.*, those dependent upon diverse citizenship, cases arising under the patent laws, the revenue laws, the criminal laws, and admiralty cases. If Congress had intended that a decree from which an appeal could be taken to this court must be a decree finally determining the cause so far as the circuit court of appeals was concerned, Congress could and would have said, "In all cases not hereinbefore in this section made final there shall be of right an appeal on writ of error or

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review of [*any final judgment or decree of*] the case by the Supreme Court of the United States," etc.

The language used, however, impliedly gives a right of review by this court of any "case" decided by the circuit court of appeals when it is of such character as not to be final in that court; in other words, when it is outside of the five classes of cases mentioned in the section, and involves more than $1,000, besides costs. The objection here made would apply also to the right of this court to review, on writ of error, any "case" under section 5 of the circuit court of appeals act, in which a demurrer had been filed raising a constitutional question, because the decision of the circuit court thereon, to review which the writ was sued out, would not be final. It is as permissible to read into section 5 the words "final decision" to give this court jurisdiction as it is to insert those words after the word "case" in the last paragraph of section 6.

If this position is not correct, a decree of the circuit court of appeals affirming an order overruling a demurrer to a bill in a suit not final in that court under section 6 of the act of March 3, 1891, could not be reviewed by this court until after it had been returned to the circuit court, testimony had been taken, and the questions involved decided on the merits.

In the case of *Smith* v. *Vulcan Iron Works* (165 U. S., 524) this court, speaking by Mr. Justice Gray, said:

> The provision of section 7 of the act of 1891, that where "upon a hearing in equity" in a circuit court "an injunction shall be granted or continued by an interlocutory order or decree," in a cause in which an appeal from a final decree might be taken

to the circuit court of appeals, "an appeal may be taken from such interlocutory order or decree granting or continuing such injunction" to that court, authorizes, according to its grammatical construction and natural meaning, an appeal to be taken from the whole of such interlocutory order or decree, and not from that part of it only which grants or continues an injunction.

The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in courts of equity of the highest authority elsewhere, appears to this court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interests; but also to save both parties from the expense of further litigation should the appellate court be of opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it.

While the principal object of the act of March 3, 1891, was to relieve the Supreme Court (*American Construction Company* v. *Jacksonville R. R. Co.*, 148 U. S., 372, 382), yet the act was also intended to benefit suitors. It was for their benefit particularly that the seventh section was enacted, so as to permit frequently the saving of the expense of a further prosecution of the suit. Providing as it does a want long felt in equity practice, it should be liberally construed. (*Bechtel* v. *United States*, 101 U. S., 597, 599; *Jones Co.* v. *Munger Manufacturing Co.*, 50 F. R., 785.)

The reason which induced Congress to give the right of appeal in cases of this kind to the circuit court of

appeals, to determine in the early stages of a suit the questions involved, applies as well to the right of appeal to the Supreme Court where the case is one which is not final in the circuit court of appeals. The purpose is to have a decision by the court of last resort on questions in the early stages of a case which may determine the entire controversy.

If no appeal can be taken to this court from the decision of the circuit court of appeals in a case brought to it under section 7 of the circuit court of appeals act, then one purpose of that act is thwarted. On the mandate of the circuit court of appeals affirming, say, the order appealed from, the lower court might in its discretion modify its order in some particular. From this order an appeal would again lie to the circuit court of appeals, and so on *ad infinitum*.

That an appeal from the decision of the circuit court of appeals in such a case as this is contemplated, is further shown by the language of the concluding paragraph of section 6, "But no such *appeal* shall be taken or writ of error sued out unless within one year after entry of the *order*, judgment, or decree sought to be reviewed."

If Congress intended that only from final decrees or judgments of the circuit court of appeals could appeals be taken, it is inconceivable that it expressly granted by this language the right to an appeal from an *order*, which is almost always interlocutory, and prior to the entry of final decree. The language is not tautological, and, if it is to be given any effect, must receive the interpretation here contended for. "There shall be of right an appeal * * * of the *case*, * * * but no such appeal

* * * shall be taken unless within one year after the entry of the *order* * * * sought to be reviewed," gives the right to appeal from an order in the "case," and not merely from a final decree. A "case" may exist without the entry of a final judgment or decree.

The act of March 3 authorizes this court to issue a writ of certiorari in any case in which there is no right of appeal. The writ may issue to bring up from the circuit court of appeals any case at any stage of the proceedings, even before judgment or decree. (*United States* v. *Three Friends*, 166 U. S., 1; *The Conqueror*, 166 U. S., 110; *Anderson et al.* v. *United States*, now before the court.) If, then, parties may have a review by certiorari of the action of the circuit court of appeals affirming a decree granting a temporary injunction in a case which would be final in the circuit court of appeals, such as a revenue case, on what ground can it be said that a case which can come to this court by *right* of appeal instead of by favor of certiorari, can not be brought here (except by certiorari) until the circuit court of appeals has exhausted its power? Did Congress intend to discriminate in favor of cases which it did not think of sufficient importance to justify the allowance of an appeal into this court, or regard them more important at one stage of the proceedings than at another?

Smith v. *Vulcan Iron Works*, *supra*, was an appeal to the circuit court of appeals from an order of the circuit court of the United States for the northern district of California granting a temporary injunction, in which this court issued its writ of certiorari. That case arose under the patent laws, and otherwise would have been final in

the circuit court of appeals. The present case is not final in the circuit court of appeals, and may, therefore, be brought to this court for final adjudication.

As the circuit court of appeals act was intended primarily for the relief of this court, the construction now contended for by opposing counsel would burden the court by requiring it to act always upon the entire record in the case. It would delay instead of advancing cases in the courts, and it would put litigants to unnecessary expense.

If this court has not jurisdiction of the appeal in the present condition of the case, and shall dismiss it, the case would have to be remanded to the circuit court, which would then simply enter a formal order making the injunction permanent. From that order or decree an appeal would lie to the circuit court of appeals, and from the decree of the circuit court of appeals affirming the decree below an appeal would lie to this court.

It is submitted, therefore, that the purpose of the circuit court of appeals act to lessen the labor of this court and to simplify and decrease the cost of litigation, and the language used to carry it out, show the evident intent of Congress to give to this court a right to review on appeal any decision of the circuit court of appeals, whether final or otherwise, in any case which is not final in that court.

The motion to dismiss should be denied.

JOHN K. RICHARDS,
Solicitor-General.

W. J. HUGHES.

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